

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

JOSEPH R. KUS,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CASE NO. 05-5735FDB

REPORT AND
RECOMMENDATION

Noted for September 15, 2006

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B), and Local Magistrates Rule MJR 4(a)(4), and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). Plaintiff, Joseph R. Kus, brings this action, appealing the denial of his application for Disability Insurance Benefits under Title XVI of the Social Security Act. *See* 42 U.S.C. §§ 1381-83f. This matter has been fully briefed. After reviewing the record, the undersigned recommends that the decision of the Commissioner be AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born in 1948, and he was 55 years of age at the time of the administrative hearing. He graduated from high school, and he attended college for two years. He has worked as a plumber for his entire career, and for the same employer from 1971 until 1999. He stopped working

1 in 1999, when the manufactured housing company he worked for ceased operating. From August
2 1999 to May 2001, Mr. Kus collected unemployment income benefits.

3 Mr. Kus alleges he has not been able to work since August 26, 1999 (Tr. 51), due to back
4 pain, "lower spinal disc degeneration of the L3, L4, L5 lumbar vertebrae" (Tr. 68). Plaintiff filed an
5 application for disability benefits on May 15, 2002. Plaintiff's application was denied initially, on
6 reconsideration. On May 12, 2004, the Administrative Law Judge ("ALJ"), found that as of July 17,
7 2003, Plaintiff's 55th birthday he was disabled. However, for the period prior to July 17, 2003, the
8 ALJ found that Mr. Kus was not disabled. Specifically, the ALJ found that he was able to perform
9 light work and make an adjustment to other work existing in significant numbers in the national
10 economy prior to July 17, 2003. Plaintiff appealed the ALJ's decision to the Appeals Council, which
11 declined review, making the ALJ's decision the agency's final decision for judicial review.

12 On November 14, 2005, Mr. Kus filed the instant complaint, alleging the ALJ erred in the
13 following manner: (i) the ALJ failed to give appropriate weight to the opinion of his treating
14 chiropractor; (ii) the ALJ failed to properly consider Mr. Kus's testimony regarding his symptoms
15 and limitations; (iii) the ALJ improperly determined Plaintiff's Residual Functional Capacity; (iv) the
16 ALJ failed to meet the burden of showing that Mr. Kus was capable of performing any work in the
17 national economy; and (v) Mr. Kus meets the requirements set forth in Medical-Vocational Rule
18 201.14.

19 DISCUSSION

20 The Court may set aside the Commissioner's denial of Social Security disability benefits when
21 the ALJ's findings are based on legal error or are not supported by substantial evidence in the record
22 as a whole. 42 U.S.C. §405(g); Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993). Substantial
23 evidence means more than a scintilla, but less than a preponderance; it is such relevant evidence as a
24 reasonable mind might accept as adequate to support a conclusion. Magallanes v. Bowen, 881 F.2d
25 747, 750 (9th Cir. 1989). We consider the evidence as a whole, weighing both evidence that

1 supports, and evidence that detracts from the Commissioner's conclusion. Smolen v. Chater, 80
2 F.3d 1273 (9th Cir. 1996). Credibility determinations are the province of the ALJ. Fair v. Bowen,
3 885 F.2d 597, 603 (9th Cir. 1989).

4 **Sequential Evaluation Process**

5 The claimant bears the burden of proving that he is disabled within the meaning of the
6 Social Security Act. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as
7 the "inability to engage in any substantial gainful activity by reason of any medically determinable
8 physical or mental impairment which can be expected to result in death or which has lasted, or can be
9 expected to last for a continuous period of not less than twelve months[.]" 42 U.S.C. §
10 423(d)(2)(A), 1382c(a)(3)(A); 20 C.F.R. §416.905.

11 In evaluating Plaintiff's claim, the ALJ followed the five-step sequential evaluation process
12 for determining whether a claimant is disabled within the meaning of the Social Security regulations.
13 Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999); Bowen v. Yuckert, 482 U.S. 137, 140 (1987);
14 20 C.F.R. § 416.920 (2000). The Plaintiff has the burden of proof at steps one through four; at step
15 five the burden shifts to the Commissioner to show that Plaintiff can perform work that exists in
16 significant numbers in the national economy.

17 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since
18 July 17, 2003. At step two, the ALJ found that Plaintiff had the following severe impairments:
19 lumbar spine degenerative joint disease and obesity. At step three, the ALJ found that Plaintiff's
20 impairments did not meet or equal the requirements of a listed impairment. The ALJ further
21 determined that Plaintiff retained the residual functional capacity (RFC) to perform a light level of
22 physical exertion with postural restrictions. At step four, the ALJ found that Plaintiff was unable to
23 perform his past relevant work. At step five, the ALJ considered Mr. Kus's RFC, age, education and
24 work experience and concluded that since July 17, 2003, based on Medical-Vocational rule 202.06,
25 Mr. Kus was unable to work any jobs due to his impairments, but the ALJ also found that prior to

1 July 17, 2003, Plaintiff was able to perform certain types of light work, specifically work as a small
2 parts assembler, a toy assembler, or a ticket seller. Thus, the ALJ found Plaintiff not disabled prior
3 to July 17, 2003.

4 ***A. THE ALJ PROPERLY EVALUATED THE MEDICAL EVIDENCE***

5 Whether a medical source's opinion will be given significant weight depends on the length of
6 the examining relationship; treatment relationship including the nature and extent of the treatment
7 relationship; the degree to which the treating source's opinion is supported by medical signs and
8 laboratory findings; and its consistency with the rest of the evidence. *See* 20 C.F.R §§ 404.1527(d),
9 416.927(d). The ALJ may reject the contradicted opinion of a treating or examining physician by
10 stating specific and legitimate reasons, and reject the uncontradicted treating or examining physician
11 opinion by providing clear and convincing reasons, supported by substantial evidence in the record.
12 Holohan v. Massanari, 246 F.3d 1195, 1202-03 (9th Cir. 2001).

13 Plaintiff objects to the ALJ's assessment of the medical opinion evidence, specifically arguing
14 the ALJ failed to consider the opinion of Dr. Chad Martin, who has been Plaintiff's chiropractor
15 since April 1992. Plaintiff argues the ALJ's failure to consider and discuss Dr. Martin's opinion
16 should compel the court to credit the opinion evidence as true and remand the matter to the
17 administration for outright award of benefits.

18 Plaintiff's argument raises the issue of what evidence an ALJ must address in his or her
19 written opinion. The ALJ is not required to discuss or fully analyze all evidence presented. Vincent
20 v. Heckler, 739 F.2d 1393, 1394 (9th Cir. 1984) (*citing* Lewin v. Schweiker, 654 F.2d 631, 634 (9th
21 Cir. 1981)). The ALJ need only explain why "significant probative evidence has been rejected." *Id.* at
22 1394.

23 The court cannot expect an ALJ to comment on or address every piece of evidence presented
24 at the administrative level. Some cases involve dozens of medical opinions, while others only have a
25 handful of medical reports to review. Moreover, a claimant has often been treated by different

1 physicians for completely different purposes, and reports are limited to a simple snapshot of ailments
2 during a particular evaluation. It is thus necessary and appropriate for the ALJ, often with the
3 assistance of consulting physicians and medical experts, to sift through conflicting medical evidence
4 to make a decision. The court assumes the ALJ has reviewed all of the evidence on record, even
5 though he or she has not cited or commented on much of the material contained therein.

6 Here, the ALJ properly reviewed the medical evidence and made a reasonable decision,
7 supported by substantial evidence in the record. The ALJ noted the opinions of Dr. Quint, Dr.
8 Reisweig, Dr. Ketschmer, and Dr. Hoskins in his decision, and stating the following:

9 Consideration has also been given the reports of the state agency medical consultants
10 as well as to other treating, examining and non-examining medical sources. Greater
11 weight was given to the opinions from treating and examining physicians over the
12 opinions from the medical consultants because the former are based, in part, on actual
13 examination of the claimant. In contrast, the medical consultants formed their opinion
by perusing the available medical evidence without ever seeing the claimant.
However, the medical consultant opinion is helpful in determining the residual
functional capacity when it is given appropriate weight, as has been done in this
decision.

14 Tr. 19. Assessing Plaintiff's level of impairment, the ALJ relied on Dr. Hoskins' and Dr. Quint's
15 physical capacity assessment. Both of these physicians (Dr. Hoskins is a consulting physician and
16 Dr. Quint was an examining physician) opined that Mr. Kus would be able to perform a light level of
17 physical exertion.

18 Other than the above quoted statement, the ALJ did not discuss the evidence from Plaintiff's
19 chiropractor, Dr. Martin. Plaintiff claims this is reversible error, but the court is not persuaded by
20 the argument. A chiropractor's opinion is not an acceptable medical source and is not entitled to
21 significant weight. Gomez v. Shater, 74 F.3d 967 (9th Cir. 1996). Such evidence is considered
22 "other source" evidence and the ALJ is permitted the discretion to weigh this evidence in the context
23 of the entire record. As explained above, the ALJ found substantial evidence in the medical opinions
24 of Dr. Hoskins and Dr. Quint to support his conclusion that Mr. Kus was physically capable of
25 performing light work. Arguably, the ALJ explained that he reviewed other medical evidence, which

1 would include Dr. Martin's reports, but he did not find it persuasive. Nonetheless, Dr. Martin's
2 opinion, as argued by Plaintiff, is inconsistent with the opinions and assessments made by Dr.
3 Hoskins and Dr. Quint, and the ALJ was entitled to resolve that conflict of medical evidence. Given
4 the fact that the ALJ properly evaluated the acceptable medical evidence of record, the court finds
5 that the chiropractor's opinion did not present significant probative evidence necessitating the ALJ's
6 direct comments or explanation. In sum, the ALJ's assessment of the medical evidence is supported
7 by substantial evidence and free of legal error.

8 ***B. THE ALJ PROPERLY DISCREDITED PLAINTIFF'S TESTIMONY AND COMPLAINTS OF***
9 ***TOTAL DISABILITY***

10 Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (*en banc*), is controlling Ninth Circuit
11 authority on evaluating plaintiff's subjective complaints. Bunnell requires the ALJ findings to be
12 properly supported by the record, and "must be sufficiently specific to allow a reviewing court to
13 conclude the adjudicator rejected the claimant's testimony on permissible grounds and did not
14 'arbitrarily discredit a claimant's testimony regarding pain.'" *Id.* at 345-46 (quoting Elam v. Railroad
15 Retirement Bd., 921 F.2d 1210, 1215 (11th Cir. 1991)). An ALJ may reject a claimant's subjective
16 complaints, if the claimant is able to perform household chores and other activities that involve many
17 of the same physical tasks as a particular type of job. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.
18 1989) However, as further explained in Fair v. Bowen, *supra*, and Smolen v. Chater, 80 F.3d 1273,
19 1288 (9th Cir. 1996), the Social Security Act does not require that claimants be utterly incapacitated
20 to be eligible for benefits, and many home activities may not be easily transferrable to a work
21 environment where it might be impossible to rest periodically.

22 The ALJ addressed Plaintiff's credibility in the context of evaluating Mr. Kus' residual
23 functional capacity. In full detail, the ALJ explained that Mr. Kus's allegations of total disability
24 were not credited. The ALJ wrote:

25 In reaching this conclusion [that Mr. Kus is capable of performing light work], I

1 considered the claimant's own subjective allegations. He testified that since his
2 alleged disability onset date, his ability to function was essentially, more restrictive
3 than a light level of exertion. He alleged that he could not be on his feet more than
4 two days a week due to his "sharp" and "severe" low back pain and radiculopathy to
his left leg. The pain was supposedly so intense that his sleep pattern was interrupted,
which then forced him to take naps during the day and to ice his back one a day.

5 The claimant's testimony, however, was not fully convincing. The degree of
6 limitation alleged by the claimant was not cited in the medical reports. As revealed by
7 the medial record, his problems with toe-to-heel walking was caused by his obesity
8 that prevented him from putting one foot directly in front of the other foot.
9 Nevertheless, he was able to walk in a near straight line without any balance
10 problems. Furthermore, his gait, although slightly wide based due, again to obesity,
11 was without limp or pain (Ex. 3F-3). He only evidenced mild diffuse tenderness in his
12 lumbar paraspinous muscles, according to Dr. Quint, and no spasm was detected (Ex
13 3F-4). His motor strength was 5/5 in his deltoids, biceps, grip strength and
14 hamstrings; his sensory exam was intact; and his reflexes were 2+ and symmetric (Ex.
15 3F-4).

16 As noted in the provisions of Social Security Ruling 96-3p, pain will not be found to
17 affect an individual's ability to do basic work activities unless the individual first
18 establishes by objective medical evidence that he has a medically determinable
19 physical or mental impairments and that the impairment could reasonably be expected
20 to produce the alleged symptoms. In the clamant's situation, his degenerative joint
21 disease certainly can cause pain.

22 However, as stated in Social Security Ruling 96-4p, an individuals' symptoms, such
23 as pain, will not be found to affect his ability to work absent medical signs and
24 laboratory findings showing a medically determinable impairment that could
25 reasonably be expected to produce the alleged symptoms. For the claimant, the
26 medical findings do not support a conclusion that his degenerative joint disease is
responsible for the degree of pain he has claimed. Treatment for his impairment and
its pain has been very conservative (Ex. 3F). The claimant has not undertaken any
treatment that is identified with significant low back pain.

His credibility is further harmed by his allegations of significant manipulative
limitations, such as not overhead reaching and additional restrictions concerning his
left upper extremity. The medical record is empty of any objective findings or even
any allegations of such manipulative problems. Accordingly, the conclusions reached
by Dr. Hoskins are supported by the medical record, while the claimant's allegations
are not supported by the record.

Tr. 18-19.

The fact that the medical opinions, as evaluated by the ALJ (discussed above), are
inconsistent with the allegations of total disability alleged by Mr. Kus, is sufficient reason to discredit
those allegations. Plaintiff's argument is, in part, based on the premise that the ALJ failed to

1 accurately consider the medical record, but as discussed above, the ALJ did not err when he relied on
2 Dr. Hoskins and Dr. Quint to concluded that Mr. Kus was capable of performing light work.
3 Accordingly, the ALJ properly discredited Plaintiff's subjective allegations of total disability. The
4 ALJ's credibility determination is supported by clear and convincing reasons, based on substantial
5 evidence, and free of legal error.

6 ***C. THE ALJ'S RESIDUAL FUNCTIONAL CAPACITY AND STEP FIVE FINDINGS WERE PROPER***

7 If the ALJ cannot determine whether a claimant is disabled based on a claimant's current
8 work activity or on medical facts alone, and a claimant has a severe impairment(s), a review is made
9 of the claimant's residual functional capacity ("RFC") and the physical and mental demands of the
10 work a claimant did in the past. 20 C.F.R. § 404.1520(e). At step-five the burden of proof shifts to
11 the Commissioner to produce evidence of other jobs existing in significant numbers in the national
12 economy that Plaintiff could perform in light of his age, education, work experience, and residual
13 functional capacity. See Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999); Roberts v. Shalala, 66
14 F.3d 179, 184 (9th Cir. 1995). In Tackett, the court noted "there are two ways for the
15 Commissioner to meet the burden of showing that there is other work in 'significant numbers' in the
16 national economy that claimant can perform: (a) by the testimony of a vocational expert, or (b) by
17 reference to the Medical-Vocational Guidelines at 20 C.F.R. Pt. 404, subpt. P, app. 2." Id.

18 As noted above Plaintiff argues the ALJ erred when he determined Plaintiff's RFC (capability
19 of doing light work), when he found plaintiff capable of performing other jobs within the national
20 economy, and when he did not find Plaintiff disabled pursuant to Medical-Vocational Rule 201.14.
21 Again, Plaintiff's argument are based on the premise that the ALJ failed to properly consider the
22 medical evidence and the testimony of Plaintiff. As discussed above, the ALJ properly evaluated the
23 medical source evidence and Plaintiff's credibility. Accordingly, Plaintiff's residual functional
24 capacity assessment is properly supported by the record and this Court should uphold the decision.
25 Similarly, the ALJ was correct in relying rule 202.06, rather than rule 201.14, which applies to

1 claimant's of "advanced age" who are capable of doing light work to conclude that Mr. Kus was
2 entitled to benefits beginning July 17, 2003.

3 Moreover, the hypothetical questions posed to the Vocational Expert properly included the
4 limitations assessed by the ALJ. The expert testified that given those limitations Mr. Kus would be
5 able to perform the work of a small part assembler, a toy assembler, or a ticket seller. Accordingly,
6 the ALJ properly relied on this testimony and met his burden of showing that Plaintiff was capable of
7 performing other work in the national economy.

8 CONCLUSION

9 The Commissioner's decision is supported by substantial evidence in the record and free of
10 legal error. Accordingly, the decision of the Commissioner is AFFIRMED. Pursuant to 28 U.S.C. §
11 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days
12 from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Failure to file
13 objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474
14 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set
15 the matter for consideration on **September 15, 2006**, as noted in the caption.

16 DATED this 24th day of August, 2006.

17 /s/ J. Kelley Arnold

18 J. Kelley Arnold

19 U.S. Magistrate Judge
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